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June 17, 1992

Donna R. Searcy, Secretary
Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

Re: Petition for Reconsideration
MM Docket No. 87-268

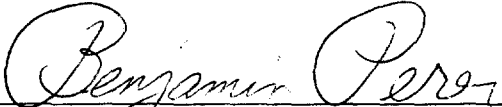
Dear Ms. Searcy:

Please find enclosed, a Petition for Reconsideration in MM Docket No. 87-268, on behalf of Polar Broadcasting, Inc., LPTV stations K08LC, K33DJ, K69FX, K30BI; Polar Broadcasting of Arizona, Inc., LPTV station K67FE; Linda K. Trumbly, LPTV stations K67FE, K22DD, K36CS; Ted C. Tucker, LPTV station K43CW; Gary M. Kenny, LPTV station K32CL; Gary M. Kenny & Deborah R. Kenny, LPTV stations K09VM, K46CZ; Peggy L. Davis and Deborah R. Kenny, LPTV station K38DD; Gary Cocola LPTV stations K34AV, K66CQ, K04NT; Kurt J. Petersen, LPTV station K58DH; Randy Weigner LPTV station W33AV; Glenn R. Plummer & Karin A. Plummer, LPTV station W48AV; Roger Skinner, LPTV station W27AQ; Buffalo Communications, Ray "Black Buffalo" Wilson, Chairman, LPTV station K53DU; Sara Biaz Warren, full-power station KJLF-TV; Vision Broadcasting Network, Inc., Pete E.M. Warren, President, LPTV station K63CD, K12MP; Broadcasting Systems Inc., Kenneth Casey, President, LPTV station K25DM; BSP Broadcasting Inc., Pete D'Costa, President, LPTV station K35BO, K53DS, full-power television station KJTL-TV; KCIT Acquisition Company, Pete D'Costa, President, full-power television station KCIT-TV; Dupont Investment Group-85.LTD, William K. Maxwell, General Partner, LPTV station K33DB; San Jacinto Television Corporation, Max F. Vigil, President, full-power television station KTFH-TV; White Sage Broadcasting Co., Larry Rogo, Managing Partner, LPTV station K07UI; Channel 29 Associates, Larry Rogo, Managing Partner, LPTV station W29AH; and, Assal Broadcasting Co., Gary Spire, Owner, LPTV station W05BZ ("Petitioner").

Petitioner is providing five extra copies of its Petition for Reconsideration so that each Commissioner may receive a personal copy.

Respectfully submitted,

POLAR BROADCASTING ET. AL

By: 
Benjamin Perez, Its Attorney

(a:52 petrecon.tru)

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JUN 17 1992

Before the
Federal Communications Commission
Washington, D.C. 20554

Communications Law Division
Office of the Secretary

In the Matter of)
)
Advanced Television Systems) MM Docket No. 87-268
and Their Impact upon the)
Existing Television Broadcast)
Service)

To: The Commission

PETITION FOR RECONSIDERATION

I. Description of Petitioner

Polar Broadcasting, Inc., LPTV stations K08LC, K33DJ, K69FX, K30BI; Polar Broadcasting of Arizona, Inc., LPTV station K67FE; Linda K. Trumbly, LPTV stations K67FE, K22DD, K36CS; Ted C. Tucker, LPTV station K43CW; Gary M. Kenny, LPTV station K32CL; Gary M. Kenny & Deborah R. Kenny, LPTV stations K09VM, K46CZ; Peggy L. Davis and Deborah R. Kenny, LPTV station K38DD; and, six other similarly situated LPTV licensees ¹, ("Petitioner") by its attorney and pursuant to

¹ Gary Cocola LPTV stations K34AV, K66CQ, K04NT; Kurt J. Petersen, LPTV station K58DH; Randy Weigner LPTV station W33AV; Glenn R. Plummer & Karin A. Plummer, LPTV station W48AV; Roger Skinner, LPTV station W27AQ; Buffalo Communications, Ray "Black Buffalo" Wilson, Chairman, LPTV station K53DU; Sara Biaz Warren, full-power station KJLF-TV; Vision Broadcasting Network, Inc., Pete E.M. Warren, President, LPTV station K63CD, K12MP; Broadcasting Systems Inc., Kenneth Casey, President, LPTV station K25DM; BSP Broadcasting Inc., Pete D'Costa, President, LPTV station K35BO, K53DS, full-power television station KJTL-TV; KCIT Acquisition Company, Pete D'Costa, President, full-power television station KCIT-TV; Dupont Investment Group-85.LTD,

§1.429 of the Rules, respectfully seek reconsideration of the Commission's Second Report and Order/Further Notice of Proposed Rule Making ("Second Report") in the above-referenced proceeding. Each individual or company identified as the Petitioner, is the licensee or assignee of one or more operating LPTV stations and each believes reconsideration of the Second Report is necessary to avoid unnecessary disruption of the broadcast services it presently provides the citizens of its communities.

II. Proceeding Status

On May 8, 1992, the Commission released the Second Report, ("Slip Opinion") which it then published in the Federal Register on May 18, 1992. This Petition for Reconsideration is therefore timely.

The Commission's Second Report reached a series of conclusions regarding the implementation of Advanced Television Service ("ATV"), which conclusions were outlined at pages 4 and 5 of the Slip Opinion. The Commission also sought further comment on various issues affecting its ATV implementation plans. Since there is significant overlap

William K. Maxwell, General Partner, LPTV station K33DB; San Jacinto Television Corporation, Max F. Vigil, President, full-power television station KTFH-TV; White Sage Broadcasting Co., Larry Rogo, Managing Partner, LPTV station K07UI; Channel 29 Associates, Larry Rogo, Managing Partner, LPTV station W29AH; and, Assal Broadcasting Co., Gary Spire, Owner, LPTV station W05BZ.

between the issues on which the Commission made a final decision and the issues on which the Commission sought further comments, Petitioner restricted its request for reconsideration to matters on which a final decision appears to have been reached, but respectfully reserve the right to submit further comments on all of the issues addressed in the Second Report.

III. Summary of Relief Sought

Petitioner seeks reconsideration of the Second Report to the extent that that decision appears to be unnecessarily harmful to the LPTV industry and the broadcast service it provides. Petitioner's comments are made in full recognition of and consistent with its secondary licensee status. Petitioner believes, nevertheless, that the ATV implementation scheme adopted in the Second Report should be adjusted to preserve LPTV as much as possible without delaying or compromising ATV; and to permit LPTV industry to participate in and help with conversion to ATV.

IV. Areas on which Reconsideration are Sought

A. The Second Report concluded at paragraph eight that all full-service television broadcast licensees, permittees and applicants on file as of the release of its 1991 Notice of Proposed Rule Making, 6 FCC Rcd 7024, would be the only parties initially eligible for ATV Channels. Then, after the

initial ATV allotments and assignments are made to this restricted group, new allotments would be added through the normal rule making process and would be opened to assignment by any qualified party. The only mechanism provided for LPTV broadcaster seeking to convert to or simulcast ATV, is to apply for an ATV allotment in competition with all other qualified applicants.

The effect of this Commission decision is to divide existing broadcasters into two categories, full-power and LPTV, and then to reward the first category and ignore or even disadvantage the second category. In effect, the Commission concludes that full-power broadcasters provide important services to their license communities and that these broadcaster's applications for ATV simulcast channels should be protected from competitive filings by newcomers. Implicitly, the Commission concluded that the services of existing LPTV broadcasters provide to their license communities are not sufficiently important to be protected from competitive filings for ATV simulcast channels. This Petitioner strongly believes that this conclusion is incorrect, unfair, illegal and not in the Public Interest.

The Second Report, explains at paragraph four that "broadcast stations provide services unique in the array of entertainment and non-entertainment programs freely available

to the American Public." The Petitioner agrees and reminds the Commission that this statement is especially true of LPTV broadcasters. The Second Report points out that over-the-air broadcasting reached 98% of U.S. households and, therefore, it is the medium most likely to result in rapid penetration of ATV receivers. The Petitioners agree and remind the Commission that for many specialized audiences and in many small cities, the LPTV broadcaster is the only or dominant over-the-air, free delivering mechanism of television. There are over 1,240 licensed LPTV stations. There are also 4,865 licensed television translators. Broadcasting, Vol. 122 No. 25 (June 15, 1992 at 52). These licensees are the principle source of free TV for a very large segment of the U.S. population. The citizens that rely on these licensees deserve early access to ATV just as much as those citizens that rely exclusively on full-power stations for their television.

As the Commission noted "There is no doubt ... that LPTV and translator services provide important benefits, serving minority and specialized audiences, providing locally-based services to communities, and generally furthering diversity." Second Report at paragraph 39. As proposed, LPTV is being cast off from "secondary" status to the deep pit with no status. The actions in the Second Report will disrupt

several hundred LPTV stations needlessly. Furthermore, if the LPTV industry is not provided a realistic opportunity to deliver ATV to its viewers, the penetration rate of ATV receivers will be significantly retarded. Thus, the Commission should recognize that the LPTV industry must be included in the regulatory approach to the implementation of ATV adopted in the Second Report if the Commission wishes to see ATV introduced as quickly and efficiently as possible.

The Petitioner respectfully suggests that the Commission's objectives would not be achieved among audiences or in areas of the country served by the LPTV industry. To achieve its objectives, the Commission must provide a transition opportunity for the LPTV industry comparable to that provided the rest of the broadcasters. Full-power broadcasters are awarded a two year competition free application period. The Petitioner does not contest that decision. Petitioner believes that LPTV broadcasters should, similarly, be awarded a two year competition free application period, following the full-power broadcaster two year period.

Full-power broadcasters are given three years in which to construct their ATV facilities once a license is issued. Budgeting one year for the Commission to process and grant the fifteen hundred full-power ATV applications it will

receive, the entire application-authorization-construction process will take six years from the opening of the initial window. Assuming, as historically has been the case, that most full-power broadcasters will not complete the construction process until near the end of the three year construction period, there will be few ATV stations on the air during the first four years following the opening of the initial competition free filing period.

If LPTV broadcasters are provided a two year competition free filing window during years three and four of the initial application process, no harm or delay will be caused to full-power broadcaster channel availability, because their applications will already be on file. Applications from non-broadcast entities filed during this initial six year period, will likely be merely speculatively applications, since the universe of ATV receivers will be small and broadcasters will not yet have established a market by simulcasting.

The Second Report, at paragraph six, explains that ATV is not a new and separate video service. For the LPTV broadcaster ATV is an enhancement of existing service as much as it is for a full-power broadcaster. LPTV broadcasters' continued involvement is, therefore, a practical, expeditious, and not-disruptive way to bring service to the U.S. public. LPTV broadcasters possess the know how and

experience necessary to implement ATV swiftly and effectively, particularly with regard to local and minority programming where they frequently out-produce their full-power brethren. As an increasing number of LPTV broadcasters move into a mature and profitable business posture, they increasingly possess the financial wherewithal to and economic interest in converting their existing programming services to ATV.

Requiring LPTV broadcasters to file for simulcast channels in unrestricted competition with non-broadcasters or new comers to their markets would have disastrous consequences for the viewers they serve. The Commission is aware that in every area that it permits unrestricted, competitive filings for new spectrum authorizations, it receives thousands of applications. This recent phenomena reflects not only the recognition that FCC licenses represent valuable franchises for the use of scarce spectrum, but also reflects technological advances in the computer production of documents and the laser printing of those documents that permits a single "filing mill" to market, prepare and file thousands if not tens of thousands of applications in a matter of weeks. The Commission has no reason to believe that when new ATV allotments open up for competitive filings, the marketing and filing of numerous speculatively

applications will not also take place.

If LPTV broadcasters must file in competition with non-broadcasters for their simulcast channels, they surely will be thrown into comparative situations with dozens of competing applicants. Long delays and few channels will be the results of LPTV broadcaster applications filed under these circumstances. LPTV broadcasters must be given a "secondary" two-year window to file for ATV simulcast channels without competition. This reasonable opportunity will provide to these broadcasters a chance to receive channels on which to simulcast their existing services in all but a few of the largest television markets. If this reasonable opportunity is not provided to the LPTV industry, large numbers of satisfied viewers will unnecessarily be deprived of their television programming source of choice.

Equitable considerations also dictate that LPTV broadcasters be given a competition free opportunity to apply for simulcast channels following the initial full-power broadcaster applications. Much as AM daytime-only broadcasters are recognized by the Commission as deserving a favored filing status because of their service to their licensed community despite their technical handicap, LPTV broadcasters are filling the vacuum created by the full-power broadcasters' failure to address the needs of language

or rural interest groups. LPTV broadcasters are also filling the vacuum created by the cost-cutting reduction in the amount of local programming produced by full-power broadcasters.

Despite resistance by financial institutions that provide construction funding, resistance by the cable television industry to their carriage, resistance by the rating service to adjustments needed to report their audiences and resistance by the full-power broadcast industry to their inclusion as a factor in the equation for what is good for the "broadcast" industry, LPTV broadcasters are rapidly becoming the primary, if not the exclusive, source of ethnic and/or local programming for U.S. communities. Their sacrifices creating this new service, and the importance of the programming they deliver, is no less than that of either a full-power television network affiliate or an AM daytime-only radio station. This service should be protected and fostered by the Commission. The important role it now plays for U.S. audiences justifies a two year competition free ATV filing window.

B. The Second Report at paragraph thirty-four concludes that the most expeditious way to resolve competing demands for ATV channels is the adoption of a draft Table of Allotments followed by a one year comment period and, then,

adoption of a final Table of Allotments. The Commission also indicates its intention to give due consideration to the efforts of the Advisory Committee when developing its allotment and assignments proposals. Unfortunately, for a variety of reasons, neither the Commission's initial attempts at developing a Table of Allotment nor the Advisory Committee's related efforts gave equitable consideration to LPTV broadcasters.

On the one hand, the development of a draft Table of Allotments was undertaken by the Commission without consideration of whether channel/locations in each television market were being used by LPTV broadcasters. Studies conducted by the Commission proceeded on the basis of identifying channels in each market usable as ATV simulcast channels by full-power broadcasters without regard to current LPTV use of those channels. These studies caused further unnecessary harm, because in each location only as many ATV channels are identified as there are full-power licensees. Even if additional channels could be identified, which would permit the pairing of full-power broadcasters on unused channels, identifying only the minimum number of channels will cause unnecessary loss of LPTV broadcast services. The Petitioner recognizes that it must be displaced in the few markets where absolutely every channel will be used to

accommodate full-power broadcasters. But, in most markets, additional channels could be identified, making such displacement unnecessary.

On the other hand, the efforts by the Advisory Committee, are necessarily tailored to be protective of and favorable to the full-power broadcast industry. Major industry organizations such as the National Association of Broadcasters and the Association of Maximum Service Telecasters have exhibited consistent, active and unremitting hostility to the LPTV industry. There is every reason to expect an organization made up of representatives of these same interests, i.e. the Advisory Committee, to exhibit the same, normal, competitive gamesmanship.

The LPTV industry competes with full-power broadcasters for local advertiser spot revenue. Helping LPTV survive the ATV transition is against the economic interest of most full-power broadcasters.² As a result, there is every reason to fear that the input of the Advisory Committee to the Commission's draft Table of Allotments will actively target LPTV-occupied channels. It is the Commission's responsibility, as protector of the Public's interests, to

²Some full-power broadcasters have become enlightened to the value of LPTV broadcast services and are now participants in the industry. Several such full-power licensees, are parties to the instant pleading. See page 1, infra.

insure that the secondary broadcast services of the LPTV industry are protected to the maximum extent possible consistent with other objectives. Although it may be a normal, predictable and even legal competitive response for full-power broadcasters to seize this opportunity to eliminate these pesky new competitors, the U.S. public will be the ultimate victim of any Commission action facilitating such an effort. But see, Second Report, at 27, note 114.

The Petitioner believes that the public interest requires the Commission to assign LPTV-occupied channels as ATV simulcast channels if and only if there are no other technically suitable channels available on which to accommodate the ATV simulcast needs of existing full-power broadcasters. The existing service of LPTV broadcasters should be protected vis-a-vis vacant full-power allotments, vacant non-commercial allotments, applicants for new NTSC permits filed after December of 1991, new NTSC or ATV allotments and, whenever suitable alternative ATV simulcast channels are available, full-power broadcasters. Any other approach will result in the unnecessary loss of existing broadcast services merely to accommodate new, speculative broadcast authorizations.

C. The Second Report concludes that LPTV broadcasters that convert to ATV on-channel will remain secondary to both

existing NTSC and new ATV licensees. This conclusion has no rational basis. At the point that both a full-power and a low-power licensee have begun ATV broadcasts, there will be no significant difference between their operations on which to base disparate treatment. Both will have expended the same resources on an ATV transmission plant. Both will have received their ATV channel without having had to compete for it in a broadcast comparative hearing. Both will be delivering the same quality of signal to their community of license. And both will have a history of local broadcast service to their community of license, although the LPTV broadcaster will probably have provided much more local service.

Why then, shouldn't the LPTV broadcaster that converts to ATV be awarded primary status also? Certainly not because to give that LPTV broadcaster primary status would slow down the introduction of ATV. It would obviously have exactly the opposite status. Certainly not because it would deprive full-power broadcasters of an ATV channel, because they would have all been given their channel already. Certainly not because Ashbacker Radio Corp. v. FCC, 326 U.S. 372 (1945), prohibits the same treatment for both full-power and LPTV broadcasters, since each argument regarding full-power broadcasters equally applies to LPTV broadcasters. In fact,

there is no rational basis for not giving LPTV broadcasters the same incentive to convert that the Commission gives full-power broadcasters.

V. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests reconsideration of the Second Report and Order in MM Docket No. 87-268, In re: Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service to incorporate the following objectives:

- The LPTV industry should be actively included in the regulatory scheme for the implementation of ATV;
- LPTV licensees should be provided a "secondary" opportunity (after the full-power two year exclusive filing period) in which to file competition free applications for an ATV channel;
- The final ATV Allotment Table should carefully avoid unnecessary displacement of existing LPTV service;
- The Commission should make use of every technically practical channel, including adjacent channels, prior to assigning ATV channels that cause the loss of LPTV service or displacement of existing LPTV licensees;
- When assigning simulcast ATV or new ATV channels, existing LPTV broadcasters should be assigned higher

priority than vacant allotments or new applicants,
whether commercial or non-commercial; and,

- LPTV licensees upon conversion to ATV, should receive primary status.

Granting this requested reconsideration, will: preserve the existing twelve hundred LPTV stations, as much as possible, without delaying or compromising the conversion to ATV; permit LPTV broadcasters to participate in the ATV conversion process and thereby better stimulate the market for ATV services; expedite the number of ATV stations broadcasting; and, promote a smoother ATV conversion process in the demographic areas identified as the most reluctant or slowest to convert, i.e. minority/ethnic, poor, elderly, religious, and other specialized programming communities which are commonly served by LPTV stations. As a result of your reconsideration, this most important source of locally produced community programs would also be spared.

Respectfully submitted,

POLAR BROADCASTING ET. AL


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June 17, 1992